H.16/03-04

**Scottish Public Services Ombudsman Act 2002**

Report by the Scottish Public Services Ombudsman
of an investigation into a complaint against

The Scottish Environment Protection Agency (SEPA)

Introduction

1. Mr C complained that SEPA failed to follow its Enforcement Policy and Service Charter in its dealings with his Company in respect of the Producer Responsibility Obligations (Packaging Waste) Regulations 1997 (the Regulations). He also complained that SEPA failed to follow its procedures correctly in the course of pursing enforcement action against the Company.

2. For legal reasons, the names used in this report are not the real names of the people concerned.[1] The glossary of names and acronyms is at page 38.

3. The Statement of Complaint for the Investigation was issued on 12 August 2003. SEPA's comments were obtained and relevant documents concerning Mr C's complaint were examined. Oral evidence was taken from SEPA staff. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked.

4. An opportunity has been given for SEPA and Mr C to comment on a draft of the factual part of this report prior to the addition of my findings and recommendations.

[1] Scottish Public Services Ombudsman Act 2002 section 15(3)

Jurisdiction

5. I am empowered to investigate administrative actions taken by or on behalf of bodies listed in Schedule 2 of the Scottish Public Services Ombudsman Act 2002 (the 2002 Act). SEPA is one of the bodies so listed.

6. Section 7(1) of the 2002 Act states that I may not question the merits of discretionary decisions taken without maladministration.

7. Schedule 4, paragraph 2 of the 2002 Act states that I must not investigate the commencement or conduct of civil or criminal proceedings before any court of law.

Statutory Background

8. The Regulations were introduced in 1997 as part of the UK implementation of EC Directive 94/62/EC on Packaging and Packaging Waste. One of the key objectives of the Directive is to reduce the impact of packaging on the environment. This includes the requirement that specific proportions of packaging waste are to be recovered and recycled. The Regulations are intended to ensure that this is done. The Regulations apply to businesses across the packaging chain which supply packaging or packaging materials to the UK market: they are based on packaging materials handled, rather than packaging waste discarded by businesses. The Regulations are enforced by SEPA in Scotland and the Environment Agency in England and Wales. Failure to comply with the Regulations can constitute a criminal offence.

9. The Regulations originally placed recovery and recycling obligations on UK companies with an annual turnover exceeding £5M and which handled more than 50 tonnes of packaging each year. In 1998 it was proposed that the annual turnover threshold should be reduced from £5M to £1M. When the Regulations were amended in December 1999, however, the annual turnover threshold was reduced from £5M to £2M. Companies meeting both the thresholds in respect of packaging handled and annual turnover are obligated under the Regulations, and are required to do a number of things, including:

- Register with the relevant Agency, and submit data on packaging handled by 7 April each year.
- Take reasonable steps to fulfil certain recovery and recycling obligations. These obligations are based on the weight of packaging handled and national recovery and recycling targets.
- Certify that obligations have been met and provide evidence of compliance by 31 January.

OR

- Join an Agency registered compliance scheme that will meet obligations on their behalf.

Compliance schemes and those producers that register direct with an Agency can meet their recovery and recycling obligations by purchasing evidence that the correct quantity and type of packaging waste has been recovered/recycled on their behalf. Such evidence can be obtained from certain reprocessors/exporters of packaging waste, the majority of whom are accredited by the Agencies.

Policy and Administrative Background

10. SEPA's 'Enforcement Policy: Guidance for Staff- Version 3' includes:

*'3. Enforcement*

*3.1 This paper applies to all enforcement action taken by SEPA. Enforcement in this context means any action taken to ensure compliance with the legislation which SEPA is charged with enforcing and can include action taken to protect, conserve or enhance the environment.*

*3.2 This includes:*

- *discussions and meetings with a view to securing regulatory compliance through education, advice, and persuasion;*
- *warning letters;*
- *formal notices including enforcement or prohibition notices;*
- *the grant, amendment, review, variation or revocation of environmental licences;*

- *submission of prosecution reports to the Procurator Fiscal or reference of cases to the police and other enforcement agencies.*

*3.3 The purpose of enforcement is to ensure that preventative or remedial steps are taken to protect the environment, or to secure compliance with the regulatory systems. SEPA's main aim is to provide an efficient and integrated environmental protection system for Scotland that will both improve the environment and contribute to the Government's goal of sustainable development. Securing compliance with legal regulatory requirements using enforcement action is an important part of achieving this aim. Prosecution will be recommended to the Procurator Fiscal where justified in order to punish offenders, to avoid recurrence and to act as a deterrent to others and thus secure general compliance with the law.'*

11. SEPA have issued a Policy Statement on Enforcement which includes:

*'Principles of Enforcement*
*SEPA's enforcement policy embraces the government's principles of good regulation.'*

*'Proportionality*
*SEPA will ensure that any enforcement action taken is proportional to the risks posed to the environment and the seriousness of the offence. As far as the law allows, SEPA will take into account the circumstances of the case and the attitude of the operator when considering action.'*

*'Consistency*
*SEPA will be fair, equitable and consistent in its enforcement. SEPA will promote a similar approach to enforcement throughout the organization and will develop and maintain effective liaison with other enforcing authorities. SEPA will treat all people equally.'*

*'Openess*
*SEPA will provide clear information and advice on the rules it applies and make it widely available. SEPA will be open about how it sets about its work, including any charges it sets, and will discuss general issues, specific compliance failures or problems with anyone experiencing difficulties.'*

*'Prosecution*
*SEPA can recommend to the Procurator Fiscal that a case be brought. Prosecution will be recommended to the Procurator Fiscal where justified in order to punish offenders, to avoid a recurrence and to encourage general compliance.'*

*Where the circumstances warrant it a case may be referred to the Procurator Fiscal without prior warning or recourse to alternative methods of enforcement.'*

*Those responsible for the offence will be reported with a recommendation for prosecution. If a company is involved SEPA will normally recommend action against the company. However, individuals in the company, such as Directors ... may also be reported for prosecution where it can be shown that the offence was committed with their express or complied consent, or was due to their negligence.'*

Summary of Events

12. I now set out a summary of the main events relating to SEPA's actions in regulating the Company.

13. **August 1997**: SEPA sent the Company a mailshot that drew attention to the fact that the deadline for registration under the Regulations was 31 August 1997. The mailshot requested the recipient to complete and return a form, in order that SEPA's records could be updated. The form required the recipient to either confirm that the business was already registered in accordance with the Regulations, or to give the reasons why the business was not obliged to register.

14. **27 August 1997**: The Company completed and returned the form to SEPA, it confirmed that it was not obliged to register since its turnover was less than £5M. It also confirmed that its turnover was more than £1M.

15. **22 December 1998**: SEPA sent the Company a mailshot which advised that businesses were obliged to register with SEPA under the Regulations if, during the preceding financial year, its turnover was more than £5M (to be reduced to £1M from 2000) and it handled over 50 tonnes of packaging materials per annum. SEPA has stated that this mailshot was issued to approximately 400 companies including Mr C's company. The mailshot requested that the Company complete and return an enclosed 15-point checklist. No. 13 of the checklist appeared as:

*'Type of packaging materials handled and approximate quantity:*
*Wood-*
*Plastic-*
*Cardboard/*
*paper-*
*Glass-*
*Metal-*
*Other-'*

16. **8 February 1999**: Mr C responded to the mailshot and completed and returned the checklist to SEPA. At No. 13 of the checklist Mr C had crossed out 'Cardboard' and opposite 'Paper' had written '500 tonnes p/a'. He also sent a covering letter with the completed form, which stated that the Company produced 'well below 50 tonnes of waste per annum' and that the annual turnover was £2.7M. He also stated that 'we currently employ only Licensed Waste Management companies for all our waste disposals, and at the onset of the need [for] compliance with the Draft Packaging (Essential Requirements) Regulations 1998 Implementing the Requirements of the EC Directive 94/62/EC on 'Packaging and Waste', we had a meeting with Officials from Glasgow City Council. They determined at that time for instance that our Paper Packaging Waste fell well below 20 tonnes/p.a and that we were therefore outwith the catchment.'

17. **29 August 2002**: The EPO, who was employed by SEPA and was responsible for enforcing the Regulations in the area in which Mr C's company operated, sent a mailshot addressed to the company secretary of the Company. This mailshot noted that, from SEPA's records, the Company had not registered with SEPA as an obligated producer; it outlined what would make a producer obligated and enclosed a more comprehensive summary of the regulations. (A copy of the covering letter appears at Annex A.)

18. **16 September 2002**: The EPO telephoned Mr C but he was unavailable. She left a message requesting that he should call her.

19. **21 September 2002**: Mr C replied by letter to the EPO's letter of 29 August on behalf of the Company. He wrote:

> *'We confirm receipt of your letter of 28th August (*sic*) where you state that our Company has not registered with SEPA as an Obligated Producer.*
>
> *The position is that this Company certainly effected registration in our letter and completed form of 8th February 1999, and copies of pertinent papers are enclosed.*
>
> *The overall position remains unchanged that this Company produces well below 50 tonnes of waste paper per annum,[..] although our annual Turnover is slightly above £2M p.a. at £3.1M in our Financial year 2001/2002.'*

20. **23 September 2002**: The EPO telephoned the Company and spoke to Mr C on receipt of his letter. Her record of the telephone conversation stated that she briefly explained the regulations and asked what the Company did. She explained that labels were considered to be packaging under the Regulations. She stated that Mr C needed to establish the quantity handled and told him that he may be able to register for 2002. Mr C told her that he was going on holiday for four weeks. The note includes '[Mr C] would try and pass onto his technical mngr so that SEPA gets data before his return'. The EPO also has

recorded that she would follow up on receipt of data and would send an audit letter to the Company for Mr C's return from holiday.

21. **31 October 2002**: The EPO sent a recorded delivery letter to the Company confirming her intention to carry out an audit of the Company. The letter stated 'I will contact you shortly to arrange a suitable date on which to meet.'

22. On the same day the EPO wrote a report to the relevant SEPA Area Licensing Team, recommending that the Company's case should be referred to the Procurator Fiscal once the results of the audit were known, on the basis that it was most probable that the Company had committed a number of offences.

23. **6 November 2002**: The EPO telephoned the Company to arrange a date to conduct an audit of the Company. As Mr C was in a meeting, she left a message.

24. **7 November 2002**: The EPO telephoned the Company and as Mr C was on the telephone, she left a message.

25. **12 November 2002**: The EPO spoke to Mr C on the telephone and explained she needed the packaging data to establish if the Company was obligated. Her telephone record states that Mr C did not have any data at present. She arranged for interviews with Company personnel and an audit to take place on 6 December.

26. **13 November 2002**: The EPO wrote to the Company confirming that the formal audit would take place on 6 December.

27. **19 November 2002**: SEPA's Area Licensing Team met and approved the recommendation made in the EPO's report to refer the case to the Procurator Fiscal.

28. **6 December 2002**: The EPO carried out an audit of the Company.

29. **17 December 2002**: The EPO wrote to the Company. The letter stated:

*'We intend to take enforcement action against [the Company], and are in the process of preparing a report for the Procurator Fiscal in respect of the Company's failure to register in 2000 and 2001 and its failure to recover and recycle as required by the Regulations in the year 2000.*

*The organisation may still be able to register with a compliance scheme in 2002 to discharge its obligation for packaging handled during 2001. In order to do this you will have to gather together all data on packaging handled during 2001, for the compliance scheme. It is considered unlikely that a compliance scheme will accept new members this late in the calendar year; however, I would recommend that you investigate this further and I have attached a list of compliance schemes in this regard.*

*If you are unable to discharge your obligations for 2002, it is our intention to take enforcement action in respect of the Company's failure to register in 2002 and its failure to recover and recycle as required by the Regulations in the year 2001.'*

Evidence from Mr C about key events

30. In a letter to the Ombudsman dated 7 January 2004, Mr C said that the EPO wrote a letter to the Company 'which was received by the Company on 30 August 2002. This letter was duly answered on 21 September 2002.' Mr C provided various extracts from his diary to indicate he was fully engaged from 30 August to 21 September and wrote:

*'Our records from 1997 show that there has been nothing but the fullest co-operation with SEPA.*

*Moving to 23 September, it is correct that [the EPO] telephoned requesting a visit to the Factory. I pointed out to her that I was on annual leave from the following day… and I would not be returning to business till Monday 21 October. I felt it essential and important to be present during such a visit as our small Company does not have the "fall back" cover and resources normally available to larger*

*organisations. [The EPO] appeared quite agreeable to contacting me upon my return….*

*On 31 October 2002 SEPA … intimated by a Recorded Delivery letter that they would audit the Company. So after 4 years of complete silence, SEPA moved straight to an Audit of [the Company] over a short 2 month period…'*

Documentary Evidence from SEPA

31. On 31 October 2002, the EPO wrote a report making a recommendation on what enforcement action should be taken against the Company for the Area Licensing Team to consider at a meeting to be held on 19 November. The full content of the report is set out at Annex B.

32. The Licensing Team met on 19 November 2002. The only record of their consideration of the EPO's recommendation on what enforcement action should be taken against the Company is included in the minutes of that meeting, which state `The Licensing Team agree with [the EPO]'s recommendation that, assuming the results of the formal audit are as expected, a report be prepared for submission to the Procurator Fiscal.'

33. On 24 February 2003, SEPA wrote to the Scottish Print Employers Federation (who had made representations on the Company's behalf) that *'...it is apparent that [the Company] has confused the provisions of the Regulations with those of the Packaging (Essential Requirement) Regulations 1998... [the Company] may also have misunderstood that both Regulations are based on packaging or packaging materials that are placed on the market, as opposed to packaging waste discarded by the company. Therefore most of the labels manufactured by [the Company] are classed as 'packaging handled' for the purposes of the Regulations. Although there are certain circumstances when labels are not classed as packaging, such exemptions do not appear to apply in this case.'*

34. Mr C complained to SEPA on 12 May 2003 about the action it had taken against the Company in the course of pursuing enforcement action. SEPA conducted an internal investigation into his complaint and an internal report was produced dated 23 June 2003. This included:

*'SEPA believes that in this instance of detecting and addressing a breach of regulations which SEPA has a duty to "police", it acted reasonably and with due regard to (among other aspects) its enforcement policy, the objectives of the relevant regulations, fairness to other regulated businesses, and the public interest.*

*The process included reference by the SEPA investigating officers to a "Licensing Team" (a misnomer, in that it deals with more than just environmental licensing decisions) which included in its deliberations the ongoing general problem of non-registration of obligated producers, the lack of a track record of successful prosecutions to date, the financial advantage which the company had achieved over other businesses which have registered, the fact that not just one but three years of non-registration was involved, and the considerable difference between the tonnage threshold of 50 and the declared estimate by the company of 500 tonnes per year (although SEPA only required to establish evidence of more than 50 tonnes).*

*Prior to that stage, the process of arriving at discretionary judgments included the following, as reported by the principal investigating officer, [the EPO], and in addition relevant correspondence was included with the complaint to the Ombudsman. [The EPO] telephoned [Mr C] on 23 September 2002 to ask for relevant data, and then confirmed to [Mr C] that the company was obliged to register. The importance of registering was explained by [the EPO]. [Mr C] intimated that he was going on holiday and would try to pass the matter on to his technical manager in his absence. On 31 October, nothing having developed, the letter intimating the proposed audit was sent. Several attempts were made to contact [Mr C], and [Mr C] has confirmed that he tried to contact [the EPO] on 8 November.*

*The audit took place on 6 December, it then being very close to the end of the current year of registration, and leaving it any later would have prevented SEPA from finally confirming that the company was liable but could yet register for 2002. Indeed SEPA was encouraging the simplest route for this, namely registration with a so-called "compliance scheme" which effectively carries out members'*

*responsibilities under the regulations on their behalf. By the time SEPA sent its formal letter (17 December 2002) intimating the audit findings it was increasingly likely that there might be difficulty in registering, but SEPA enclosed a list of Schemes with whom SEPA suggested the company should make enquiries.*

*SEPA's "Policy Statement on Enforcement … states that it can include various aspects, the list of which includes discussions, meetings, warning letters and reporting to the Procurator Fiscal. This is not a statement of a hierarchy of steps which it is always appropriate to employ. In part, such aspects were attempted in the present case, including encouragement to register for the then current year, 2002. However, such steps prior to prosecution are less appropriate when dealing with a completed breach of regulations rather than a continuing one, such as pollution discharge to a river where the one object is to stop and make amends for the pollution. The Policy therefore also states that SEPA will take into account the circumstances of the case and the attitude of the operator when considering action. It also states: "SEPA can recommend to the Procurator Fiscal that a case be brought. Prosecution will be recommended to the Procurator Fiscal where justified in order to punish offenders, to avoid recurrence and to encourage general compliance. Where the circumstances warrant it a case may be referred to the Procurator Fiscal without prior warning or recourse to alternative methods of enforcement." As mentioned previously in SEPA's responses, there did not seem to be an alternative in the present instance, such as compensating complying companies or effecting recycling/recovery for previous years, one of which involved the UK in breach of meeting its European target. However, as mentioned, SEPA did suggest that the company could still register for 2002.'*

35. In response to a SEPA mailshot in December 1998, the Company returned a checklist form in February 1999. SEPA's internal investigation of the complaint dated 23 June 2003 commented:

*'The checklist form indicated that the company was not obligated at that time. The form became part of the information which SEPA uses*

*to investigate a sample of several dozen companies per year with a view to checking compliance with the regulations. [….] SEPA concedes that in an ideal world further specific correspondence could have ensued at that time, since the company appears to have misunderstood the position, stressing that the company would have to register when it eventually fell within the regulations. However the practical route for SEPA, given the thousands of potentially liable companies at the outset of SEPA's mailshot campaign, has been auditing on a sample basis. SEPA had of course promulgated all the necessary information by the time the checking of non-registered companies took place.'*

36. SEPA replied to preliminary enquiries by my Complaints Investigator in an e-mail dated 30 July 2003. In answer to a question about what standard procedures would be followed when SEPA became aware that a company might have breached the Regulations, SEPA advised:

*'There is no written procedure to be followed.*

*In the case of an offence for previous years, the question of what action SEPA takes is referred to its local licensing team. … The licensing team will consider all relevant factors, which may include in the present case the ongoing general problem of non-registration of producers, the lack of a track record of successful prosecutions to date which impacts on the credibility of the regulator, the financial advantage which the company has achieved over other businesses which have registered, and the seriousness or period of "failure" involved.*

*Curing ignorance is something that SEPA often attempts to do as resources permit, by way of mailshots and seminars, but it is ultimately up to businesses to take their own advice and ascertain environmental and other regulations applicable to them. However, in the case of claimed ignorance or mistake, the Licensing Team will include that claim as one of the factors in reaching any decision on enforcement action.*

*It is standard practice for SEPA to undertake an audit to confirm that the information supplied by a company is accurate rather than estimated.*

*SEPA usually attempts to have an informal meeting prior to moving to a formal audit, however in this case this was not possible due to the difficulty in engaging the company in active and fully co-operative discussion, other than providing estimated packaging figures.'*

37. In a letter dated 1 September 2003, in response to the Statement of Complaint issued by my Complaints Investigator, SEPA stated that:

*'SEPA believes that it did follow its enforcement policy, the essential elements being: to alert the company to our investigations; to obtain precise information; to allow opportunity for the company to get its house in order …; and in particular to take into account any appropriate effect on enforcement action if a company swiftly corrects defects. In the current case it was eventually determined that referral for prosecution was necessary, among other considerations, in order to persuade this company to register and carry out its recycling (etc) obligations. …*

*SEPA is disappointed that progress could not have been made sooner, around 23 September 2003. Presumably other officials of [the Company] with whom SEPA has had business dealings, could have taken things forward in the absence of the managing director.'*

38. In one of the files that SEPA provided there was a document relating to another company. This company had also committed several offences under the Regulations but had been dealt with by a different SEPA Area Office from that which dealt with Mr C's Company. SEPA's enforcement action against this company had taken place a year earlier than that taken in the present case. In this case, SEPA had decided to issue a Final Warning letter rather than referring the matter to the Procurator Fiscal. SEPA provided further documentation regarding its handling of the case, including the relevant EPO's report to the Licensing Team and the minutes of the Area Licensing Team's meeting. The

minutes of the relevant Area Licensing Team meeting of 30 July 2001 recorded that:

> *'It was noted that although the evidence appeared to be good with respect to non-compliance, not only did the company appear to be ignorant of the requirements of the regulations, but SEPA's records show that the company had never received the standard notification from SEPA of the regulations. In addition, there had been no Final Warning letter sent to the company giving them the opportunity to comply, unlike in the previous Producer Responsibility enforcement matters reported to this licensing team. There was a general discussion regarding the appropriate enforcement action in the circumstances in particular submitting a report to the Procurator Fiscal or issuing a final warning letter. In the circumstances it was considered that it would only be appropriate to issue a Final Warning letter. This would also be consistent with previous licensing team decisions.'*

39. When SEPA was asked by my Complaints Investigator why the enforcement action in respect of the two companies was different, SEPA replied:

> *'As to why the decisions were different, to refer for prosecution in just one of the cases, the Chairs of these two licensing teams do not recall the team discussion, and the [ ] Area Team minute (for [the Company]) is sparse.*
>
> *These teams are empowered to make decisions under the general high level enforcement policy contained in documents already with you, but are not obliged to reach identical decisions in identical circumstances (a matter which is under review as part of the Effective Regulation Programme of which you have been informed, the present enforcement policy not necessarily being an accurate reflection of what happens in detail in reaching decisions).*
>
> *There was however more than a year between the two decisions, during which period SEPA was subject to increasing criticism, in the press and from individuals, for its historical policy of preferring to*

*achieve environmental benefits through co-operation with industry rather than hard regulation and prosecution.'*

40. SEPA provided details of the Scottish Executive's Performance and Financial Management Review. It also provided 'Consultation on the Outputs of the Effective Regulation Programme – September 2003: SEPA's Vision for Regulation' and ''Protection and Improving the Environment Through Regulation: SEPA's Vision for Regulation'.

Oral Evidence from SEPA Staff

Evidence of the EPO

41. The EPO told my staff that she had joined SEPA on 4 February 2002. She said she was the only EPO dealing with producer responsibility in the relevant Area. She undertook audits of one third of all registered companies, that is, companies which were registered direct with SEPA or with their own compliance scheme.

42. The EPO said that when she began working at SEPA she had no experience of the Regulations and SEPA did not provide her with any formal training in its practices and procedures. She did have a lot of experience in different types of audits from her previous employment and was given some informal training by her predecessor. There was no written guidance on SEPA's practices and procedures, apart from the manual 'Winning your Case' and if she needed any guidance she would consult her line manager or the Producer Responsibility Unit in SEPA headquarters. SEPA did have an enforcement policy but there was no practical guide of how this should be followed and applying it was a matter of following one's common sense.

43. One of the EPO's duties was to investigate companies which were not registered and should be registered under the Regulations. In 2002, 16 companies were selected to be investigated. There was no selection process as such but the EPO worked through a file of companies in alphabetical order, selecting those that she considered likely to meet the relevant thresholds. She was able to make an educated guess on the basis of a company's turnover, their activity, or from their contact with other companies whether there was a likelihood that a company was

obligated. She was able to ascertain which companies potentially handled packaging by the nature of the company's business. The EPO contacted the different firms in turn throughout the year. She would send a pro forma out and some firms would send the forms back immediately. In those cases she would call the company and talk to them informally, even if it did not look as though they were required to be registered, in order to make sure the company had understood the basis for registration. She would then write to the company confirming that either no further follow-up was required or that she would need to visit. When she visited she would take a look at the packaging the company had and explain what they needed to do to get registered.

44. The EPO explained that the purpose of this was to get obligated companies to become registered for the year. All the companies that she had visited and that she had found needed to register had done so, apart from Mr C's. Some companies had registered as the result of the first letter going out. Even if a company registered she would have to go back to the company to do a formal audit and, if necessary, further enforcement action would be taken.

45. If the EPO performed a formal audit and found that the company did meet the thresholds for previous years, then she would prepare a report for the Licensing Team. She would consider factors such as the company's activities, the tonnage, the handling, whether the company is with a trade association, how many offences had been committed and the period of time over which they had been committed. She would then decide what her recommendation to the Licensing Team should be. The criteria that she used to determine her recommendation were from her own common sense. She had no written guidance on how to reach a decision on what recommendation to make and no guidance on what information should be included in the report to the Licensing Team. She followed the examples given by four or five reports that her predecessor had written. There were no procedures in place, to her knowledge, to ensure that her recommendations were in line with similar decisions made by the other SEPA areas.

46. The EPO sent the pro forma letter to the Company on 29 August 2002. Mr C replied on behalf of the Company on 21 September,

confirming the turnover was £3.1M and that waste production was well under 50 tonnes a year. He also enclosed a copy of letter of 8 February 1999, which contained the information that the company handled approximately 500 tonnes of packaging materials a year. The EPO telephoned Mr C on 23 September, the day she received this information, since she realised that the company had 500 tonnes of packaging. She spoke to Mr C and explained the position. He told her that he was going on holiday and would pass the matter on to his Technical Manager to deal with while he was away. The EPO had understood that Mr C would have returned from his holiday by the end of October since he told her on the phone he would be off for four weeks. She believed that he would have returned from his holiday before 31 October when she next wrote to him. In her letter she confirmed that she intended to carry out an audit of the Company to ascertain compliance with the regulations. She said that when she used the term 'audit' she meant more of a visit and informal chat, rather than a formal audit under caution.

47. The EPO telephoned the Company and left a message on 6 November and on 7 November and on 12 November she spoke to Mr C. She was aware that Mr C said that he called her back between these times but she did not think that he could have. She had voice mail on her phone and certainly did not have any messages. However, she shared her voice mail with two others, so possibly it could have been wiped or something. She said that since they were getting to the end of the year she told Officer A that she thought that she would have to go to formal audit, since Mr C was not being forthcoming. It had reached the point where they made it formal since the informal approach wasn't working.

48. The EPO considered that it was pretty likely that the Company met the thresholds, since she had been told during her earlier conversation with the Company that it printed labels and dealt with 500 tonnes of packaging material. The EPO had tried to deal with the Company informally but that when it had not been possible to get hold of Mr C she decided that it was necessary to "step up a gear" and conduct a formal audit. She had discussed this with Officer A.

49. The EPO had considered previous cases on which her predecessor had taken decisions and made recommendations and followed on from

those, assuming that they were a standard that had been set. She thought she had referred to four or five previous cases.

50. My officer asked the EPO to comment on a case dealt with in another SEPA area in 2001 where the circumstances seemed similar to those in the Company's case but only a final warning letter was issued. The EPO said that she had not been aware what the other areas were doing: as far as she was aware, there was no co-ordination between areas.

Evidence of the solicitor

51. A solicitor employed by SEPA told my officers that the Area Licensing Team (the Licensing Team) dealt with enforcement issues and licensing issues. It was responsible for deciding what action to take on producer responsibility cases, including whether they should be referred to the Procurator Fiscal for possible prosecution. Producer responsibility was, however, a very small part of its work. In general the Licensing Team was composed of members of SEPA's management of the relevant area. Normally, if she was present, the Solicitor would chair meetings, although the minutes suggest she did not chair the meeting on 19 November. There could also be input from relevant specialists about papers that come before it. Following a discussion the Licensing Team would come to an agreement on how to dispose of cases.

52. An officer would write a report in conjunction with any other officers who might have been involved and would liaise with their team leader, who would look at the report. The officer would present the report to the Licensing Team for consideration. Usually the officer would present the report in person. The minutes indicated that the EPO had not been present at the meeting on 19 November. The Solicitor could not remember if the EPO had spoken to anyone on the Licensing Team beforehand.

53. She could not remember much about this particular case. She had looked at the minutes of the relevant Licensing Team meeting. These had not been useful in helping her recall how this case had been discussed, or recall any reasons for the decision taken. She could not remember if any possible mitigating circumstances had been mentioned, or if alternative

courses of action had been considered; sometimes discussions were fairly lengthy, sometimes a recommendation was rubber stamped. The Licensing Team was aware that the EPO would have discussed a case with their team leader. However, the Licensing Team did not always accept recommendations made by EPOs. It would consider papers brought before it in terms of the enforcement policy.

54. The members of the Licensing Team were not necessarily aware of the decisions being taken in the other areas. Area Licensing Teams acted as fairly separate units. Unless somebody happened to be aware of a case, or the officer included it in the report, the Area Licensing Team tended to act within a regional basis.

55. The Licensing Team would consider the papers that came before it in terms of the enforcement policy but achieving consistency between areas was a challenge. There has now been a move to a national system in dealing with these cases, which it was hoped would help ensure a consistent approach. The Solicitor was not aware of any national policy on producer responsibility cases existing at the time, apart from the enforcement guidance and the manual, 'Winning Your Case'.

56. She could not recall the Licensing Team having any targets for numbers of prosecutions or referrals to the Procurator Fiscal. She knew that in her area there had been one successful prosecution in a producer responsibility case. She was not aware of any pressure on the Licensing Team to refer producer responsibility cases to the Procurator Fiscal, even when it was known that the UK was not compliant with the relevant EU directive. She did not know of any desire by SEPA to achieve consistency with approaches taken in England.

<u>Evidence of Officer A</u>

57. Officer A confirmed that he was the EPO's Line Manager. He explained that before the appropriate Producer Responsibility legislation had come into force, he had been involved with the Strategic Planning Directorate (SPD) in setting up relevant operational procedures to implement the legislation and how it was set up in the South West Area. The Producer Responsibility Unit (PRU) had a co-ordinating role, in that it was where companies would go in order to register. However, regulatory

matters such as organizing audits were an operational matter for which responsibility lay with the EPO in his team.

58. The EPO did not have any formal training from SEPA when she first started. She had experience of auditing from her previous job; she had desk-top training and he got her predecessor to show her the ropes and take her out to do a few audits with her. The standard letters that she used would have come from the Producer Responsibility working group. The letters were produced partially by Officer A through that group. The procedures for dealing with freeloaders were the same throughout SEPA – there were procedure guidelines which were very basic, in the form of a flow diagram.

59. In this particular case he thought the EPO looked up previous letters that went out to companies to do a check on whether the companies were obligated. Then the company would be contacted in order to make arrangements to go and talk to them; every case was different. If they were suspicious about a company, an officer would go out and audit the company and then, when the officer reached a stage that it seemed the company was definitely obligated, they would arrange for a colleague to come and act as a witness to the audit. It was at that stage that it became more formal. There was no separate procedure when it was suspected that a company had been obligated in previous years but had failed to register. SEPA would try to establish whether an offence had been committed and, if so, it would be for the officer to draw up a report and submit it to the Licensing Team for discussion. The officer would discuss it with Officer A in advance before going to the Licensing Team.

60. There was no written policy on what to do where it was found that a company had committed an offence. Each case was considered on its merits, particularly the extent of the breach of the regulations. In the Company's case, SEPA looked at the number of years that it had not been registered and whether there were any mitigating circumstances. There was no set policy or guideline if a company had breached the regulations for a number of years: Officer A would look at an offence within the regulations and if there was an offence there would be potential to refer the matter to the Procurator Fiscal. Where a company had been in breach for a few years, Officer A would expect to make a recommendation for a

referral to the Procurator Fiscal but he could only speak about the ones that he had dealt with. In this case the Company had failed to register for several years and that was quite significant. On that basis it would be reported to the Licensing Team with a recommendation for a referral. Mitigating facts can be put forward, but in this case Mr C had been informed by letter of what is required of obligated companies and as such it was his responsibility to keep up to date with legislation. Also, it was shown that he had failed to register for several years and that was enough for a report to be made.

61. In respect of Mr C's reply to SEPA's 1998 letter giving the impression that he was confusing the legislation with other packaging waste legislation and consequently thought that it was packaging waste rather than packaging material that was the crucial factor, Officer A did not consider that it was up to SEPA to decide whether it was a genuine mistake or not.

62. The report prepared for the Licensing Team did not contain everything that might have been taken into consideration. There was usually a bit of discussion at the Licensing Team meeting when the EPO presented the report. In this case the EPO did not attend the meeting and so it must have been presented by someone else, although Officer A did not know who it was, as he was not present either. Apart from himself, he did not know who else the officer would have discussed the content of the report with before submitting it to the Licensing Team, as there were no set procedures, although the officer would probably have talked to the legal adviser.

63. The EPO wrote the report before the audit. Once she had performed the audit, she wrote a full and detailed report to the Procurator Fiscal and she could include any mitigating circumstances. If the Procurator Fiscal took it on, then the defence could present any mitigating circumstances.

64. The reason the EPO prepared that report and made the recommendation to refer the matter to the Procurator Fiscal on 31 October, before the EPO had performed the audit, was because the Licensing Team only met every fortnight and SEPA liked to get referrals to

the Procurator Fiscal as soon as possible after an offence was discovered. The EPO wrote the report to the Licensing Team on a conditional basis. If, after she had conducted the formal audit, she discovered the company had been in contravention of the legislation for the past three years, she had the permission of the Licensing Team to report the matter to the Procurator Fiscal.

65. In relation to the apparently similar case dealt with in another area in 2001 (paragraph 38), Officer A said that since the time when that decision had been made, SEPA had been heavily criticized for not enforcing the regulations rigorously enough and part of the reason for the UK being one of the few member states not reaching the recycling recovering targets was down to companies not registering. He said that there was no pressure put on him by SEPA to secure more convictions, but he recognized that there were criticisms from outside about enforcement and the way that he dealt with this was by looking at the cases that came in front of him to see if they should be reporting the case to the Procurator Fiscal. He was aware that the Environment Agency in England were getting successful prosecutions and SEPA did not seem to be enforcing with the same rigour.

66. Officer A could not recall whether he had referred all the cases where there was evidence of a past breach of the regulations to the Procurator Fiscal. He said that it all depended on the strength of the evidence; the Procurator Fiscal would not pursue a case where the evidence was not sufficient. He knew of one or two cases where the Procurator Fiscal had decided not to prosecute after SEPA had referred the cases.

<u>Evidence of Officer B</u>

67. Officer B confirmed that she was team leader of the Producer Responsibility Unit. She told my officer that she was responsible for policy development and co-ordination and implementation of EC directives on Producer Responsibility. The PRU co-ordinated the monitoring that was carried out. PRU did not co-ordinate enforcement activity which was a matter for each area team to decide upon.

68. She believed that procedures for ensuring consistency were similar throughout SEPA in that as legislation came in, policies were developed by PRU and cascaded down into the areas and put into place by each area. As the manager of PRU, she liaised with the Environment Agency and Northern Ireland in an attempt to maintain consistency. She was aware that SEPA was being criticised quite heavily by the Environment Agency for not having any successful prosecutions. There were three cases that were referred to the Procurator Fiscal in 1999 but they had been rejected. The impression given by industry and central government was that they wanted SEPA to review how they were handling things. There was no pressure put on staff to get convictions, but PRU did encourage staff to have a hard look at what the enforcement policy was in respect of the Regulations and to ensure that enforcement action taken against Scottish companies was similar to that taken in England and Wales.

69. The Packaging Waste Regulations do not just apply to Scotland. Businesses choosing to join a compliance scheme may join one that is registered with any UK environment agency. Therefore, Scottish companies may join an Environment Agency registered scheme and English companies may join a SEPA registered scheme. As a result, the requirement for a consistent approach throughout the UK has, perhaps, been stronger with these Regulations than they may have been with other legislation.

70. Officer B stated that, in 2002, SEPA did not have any policy on how companies that had breached the Regulations in previous years should be dealt with. Such breaches were dealt with on a case by case basis following the general approach contained in SEPA's enforcement policy. The Regulations have only been in force since 1998 and a formal specific policy on how to deal with companies that have breached the Regulations in previous years was not considered necessary until recently. Over the last year the PRU had commenced developing such a policy. There used to be monthly meetings between area staff and unit staff when a lot of things were discussed. A degree of consistency was ensured by having regular discussions about what was happening.

71. When Officer B was referred to the similar case that SEPA dealt with in July 2001 (paragraph 38), she said that quite a lot had happened in a

relatively short period of time. There were two main events, firstly that SEPA had been involved in a high profile case and had been heavily criticised for not enforcing the Regulations properly and in particular that they had not taken any prosecution action and shortly afterwards it was revealed that the UK had failed to meet the directive targets, part of the reason being due to companies failure to register. The whole point of the regulations was to ensure that the UK met its directive targets. The fact that companies failed to register and declare their obligations had contributed to the UK failing to achieve the target. As a consequence SEPA was responsible for 'upping their enforcement activity', and so a case that might have previously received a warning letter would be treated more seriously. The organisation as a whole was aware of the criticisms.

72. When asked why the standard letters included in mailshots did not contain details of the relevant deadlines for complying with the Regulations that had to be met, Officer B stated that some, if not all, of this would have been included in the information sheets that normally accompanied mailshots. She added that the Regulations are considered to be some of the most confusing environmental legislation faced by industry. Because of this, SEPA tends to restrict the contents of standard letters to the minimum required for a company to be able to consider its obligations, and further details are provided on information sheets. The Regulations have been changed four times since 1997 and SEPA has had to amend their documentation accordingly. She considered that the mailshot sent to the company in 29 August 2002 was a reasonable approach by SEPA as it clearly stated the company should contact them to clarify anything.

73. After SEPA was sent a copy of the first draft of the evidential part of this report they provided my Complaints Investigator with a further statement from Officer A:

> 'As neither [the EPO] nor myself could be at the Licensing Team and I could see that the report did not include any detail on [the Company's] argument of misunderstanding the legislation and the advice given, I discussed these aspects with Officer D. I did not record the date or time of the discussion. I advised Officer D of those

circumstances but advised that I stood by the recommendation in the report. [The EPO] was present when I discussed the matter with [Officer D]. I did not raise this at my interview with [the member of the Ombudsman's staff] as I was somewhat uncertain at the time and wanted to confirm that it was [Officer D] I spoke to. I spoke to [Officer D] after the interview. Although he does not doubt this discussion took place, he could not recall it or discussing it with the Licensing Team, due to the time that has since passed. On discussion with [the EPO], [the EPO] remembered the discussion taking place in her presence. I also recall talking to [Officer D] after the Licensing Team met, to discuss the outcome, and he confirmed that the recommendation in the report was accepted after due consideration of the circumstances. It is unfortunate that the minutes do not reflect this. SEPA's enforcement policy did not form part of our conversation.'

74. At the same time, SEPA confirmed that the EPO recalled that she had been present when her Line Manager (Officer A) had spoken briefly to a member of the Licensing Team and briefed him on the background to the Company's case before the Licensing Team met to consider her recommendation. She was not able to recall, however, any detail of what was said, or how long it was before the Licensing Team met that the conversation took place. She also recalled discussing the investigation and findings of the case with the Solicitor to obtain her advice on her findings and on what steps should be taken.

Findings

75. It is not for me to comment on whether SEPA should have referred a report to the Procurator Fiscal in respect of the alleged offences committed by the Company. That decision was a discretionary one and as such I am restricted to considering whether it was reached with maladministration. I fully accept that SEPA has an obligation to enforce the Regulations, however I consider that it also has an obligation to establish and follow appropriate procedures. Failure to do so would constitute maladministration. I found that there were five key aspects of concern in respect of SEPA's dealing with the Company:

76. First, in December 1998 SEPA sent the Company a mailshot and requested that a checklist should be completed and returned. In February 1999 Mr C returned the completed checklist. The information provided by him was sufficient to indicate that the Company would meet the relevant thresholds of the Regulations in the following year. Mr C's reply also gave the impression that he misunderstood the contents of the Regulations and how they might apply to the Company. SEPA did not take any action in respect of this information until 29 August 2002, by which time the Company may have been in breach of the Regulations for almost three years.

77. SEPA has acknowledged that '… in an ideal world further specific correspondence could have ensued at that time, since the company appears to have misunderstood the position, stressing that the company would have to register when it eventually fell within the regulations. However, the practical route for SEPA, given the thousands of potentially liable companies at the outset of SEPA's mailshot campaign, has been auditing on a sample basis.'

78. However, SEPA only sent the 1998 mailshot to approximately 400 companies and requested that a checklist should be completed and returned in order for it to update its records. In these circumstances I consider that it would have been reasonable for SEPA to have used the information that was returned by the companies to update its records and highlight any companies that were likely to fall within the Regulations when the thresholds changed, or whose turnover or packaging was likely to come within the thresholds in the future. This would not have been incompatible with auditing companies on a sample basis. In the event, SEPA does not appear to have used the information returned by the companies for any purpose. In this particular case, the result was that the opportunity to appraise the Company of its liabilities under the Regulations before a possible breach occurred was missed. More generally, it seems to me poor practice for public bodies to require companies to provide information if no effective use is to be made of the information obtained.

79. Second, SEPA is not obliged to refer all suspected breaches of the Regulations to Procurators Fiscal for possible prosecution. It has

discretion in deciding which cases to report. SEPA did not have any written procedures in place as to how companies that had breached the Regulations in previous years should be dealt with. SEPA stated that such breaches were dealt with on a case by case basis with reference to SEPA's enforcement policy. This would have been reasonable, given the relatively small proportion of SEPA's regulatory work that concerns the Regulations, if SEPA had provided its staff with general written guidance on how the enforcement policy should be implemented. However, SEPA did not have any such guidance. Without such practical guidance for its staff, I find it difficult to see how SEPA could achieve consistency in reaching decisions or deciding what enforcement action would be appropriate given the circumstances of each case.

80. Third, I have noted in paragraph 38 that another case, the facts of which seem similar to those of the Company's, was considered by a different SEPA Area Licensing Team in 2001 and it was decided that it would only be appropriate to issue a Final Warning letter, partly on the basis that this would be consistent with previous Licensing Team decisions. In commenting on that decision, SEPA have said (paragraph 39) that Licensing Teams are empowered to make decisions under the general high level enforcement policy but are not obliged to reach identical decisions in identical circumstances.

81. While that might be acceptable as a general proposition, it is important for reasons of accountability and consistency that the basis on which decisions are made is clear. It is equally important that the reasons for the decision are recorded. In this case, there is no record of how SEPA reached its decision on what enforcement action to take against the Company and what factors, other than that it was likely that the Company had reached the relevant thresholds, it had taken into account. When the EPO made her recommendation to the Licensing Team and the Licensing Team considered and approved the recommendation:

- The EPO did not record in her recommendation the full circumstances of the case, the attitude of the operator, her reasons for making the recommendation, nor how her decision was in accordance with the enforcement policy.

- The EPO did not attend the Licensing Team's meeting at which her report was considered, nor did her line manager, Officer A. At a late stage in this investigation (paragraph 73) Officer A stated that he briefed Officer D, who was going to attend the Licensing Team meeting, on the circumstances of the case. Details of this briefing, or even the fact it took place, were not recorded in writing by Officer A or Officer D.

- The minutes of the Licensing Team's consideration of the recommendation do not make any reference to Officer D presenting any details in respect of the Company's circumstances at the meeting and do not record the Team's deliberations or any of its reasons for accepting the EPO's recommendation; no reference is made to the enforcement policy or how it was applied to the case and no reference is made to any alternative enforcement action being considered.

I find fault in SEPA's failure to keep written records of its decision-making process. Without such records it is not possible for the decisions taken by SEPA to be transparent or for consistency to be monitored.

82. Fourth, the EPO wrote a report on 31 October 2002 for the Area Licensing Team on what enforcement action should be taken against the Company. The report recommended that the case should be referred to the Procurator Fiscal if an audit confirmed that the Company met the relevant thresholds under the Regulations. On the same day she wrote to the Company to arrange an audit of company records and interviews of relevant personnel. The Area Licensing Team met and approved the EPO's recommendation on 19 November 2002. The EPO conducted an audit of the Company and interviewed the relevant Company personnel on 6 December 2002.

83. SEPA's enforcement policy states: 'As far as the law allows, SEPA will take into account the circumstances of the case and the attitude of the operator when considering action.' In this case SEPA reached a decision on what enforcement action to take against the Company without waiting for the audit and interviews to have been completed and therefore relevant factors that are set out in the enforcement policy were not taken into consideration.

84. The reason given by Officer A for the decision on enforcement action being taken before the audit and interviews had been conducted, was that SEPA liked to get offences to the Procurator Fiscal as soon as possible after an offence was discovered. I do not know what delay would have occurred if the EPO had waited until after the audit and interviews had taken place before she wrote her report for the Licensing Team, but since the Licensing Team met every two weeks it seems unlikely that any delay would have been excessive. In any event, since SEPA knew that an audit and interviews were pending at the time it made its decision on what enforcement action to take against the Company, SEPA could not have had proper regard to its enforcement policy when it reached its decision and I criticise SEPA for this.

85. SEPA has said that it 'usually attempts to have an informal meeting prior to moving to a formal audit, however in this case this was not possible due to the difficulty in engaging the company in active and fully co-operative discussion, other than providing estimated packaging figures' (paragraph 36). The EPO's oral evidence (paragraph 48) was that it was only after Mr C proved to be unco-operative that she decided to 'step the matter up a gear'. I find these statements surprising. Mr C's recollection of his telephone conversation with the EPO on 23 September is significantly different from her record of it. I cannot be certain what was said during that conversation. However, there is no clear evidence that SEPA made any significant attempt to engage the Company in active discussion before the EPO made her recommendation on what enforcement action should be taken against the Company on 31 October 2002. While the EPO may have expected a response from the Company while Mr C was on holiday, there is no evidence that the Company made any attempt to avoid such engagement or withhold relevant information. It is clear that the EPO was aware that Mr C was on holiday for four weeks and this could have been taken into better account by SEPA. It has been acknowledged by SEPA that the Regulations are particularly complex and in these circumstances it is especially important that steps are taken to enable understanding by businesses affected by them. I can see no evidence that SEPA seriously attempted to have an informal meeting prior to moving to a formal audit or that they attempted to engage the

Company in active and fully co-operative discussions, in order to enable it to comply with the Regulations in 2002.

86. Fifth, SEPA conducted an internal investigation into the complaints that Mr C wanted me to consider and the results of the investigation are contained in a report dated 23 June 2003. The report details the factors that were taken into account by the Area Licensing Team when it considered the EPO's recommendation on what enforcement action to take against the Company. The Licensing Team '...included in its deliberations the ongoing general problem of non-registration of obligated producers, the lack of a track record of successful prosecutions to date, the financial advantage which the company had achieved over other businesses which have registered, the fact that not just one but three years of non-registration was involved, and the considerable difference between the tonnage threshold of 50 and the declared estimate by the company of 500 tonnes per year.'

87. I am unclear as to how the internal investigation was able to provide such a detailed account of the Area Licensing Team's deliberations, when there is no contemporaneous record of what was taken into consideration or how the Team reached its decision. When my staff interviewed relevant SEPA personnel eight months after the internal report was compiled, none of them had any recollection at all of what the Licensing Team had considered. The internal investigation did not identify any shortcomings in SEPA's practices and procedures, other than it should have dealt effectively with the information provided by Mr C in 1999 and correct his possible misunderstanding. This investigation has found that there were substantial failings in SEPA's practices and procedures.

88. Finally, during the course of this investigation, SEPA has given its assurance on many occasions that it considers that the enforcement action taken against the Company was fully in accordance with its enforcement policy. Given the lack of guidance on how SEPA's policies should be implemented; the absence of adequate records of the basis on which decisions were made in this case; and the inability of SEPA's officers to recall details of their decision making I do not consider that there is evidence to support SEPA's assurances.

89. I consider that the failings I have identified amount to maladministration. In these circumstances, I uphold Mr C's complaint.

Recommendations

90. I am aware that SEPA is in the process of introducing new procedures and guidance in response to recommendations made by Audit Scotland and a Performance and Financial Management Review conducted by the Scottish Executive, as well as on its own initiative. I understand that such modifications take time to implement and for the results to be apparent. However, in order to ensure that the instances of maladministration that I have identified in this report are not repeated, I consider that SEPA needs to review its current policies and procedures, and revise these as a matter of urgency.

91. I recommend that SEPA should:

- introduce guidelines on how its enforcement policy should be put into practice by its staff, as a matter of priority;

- ensure that all relevant staff are given training in the guidance, and introduce procedures to ensure that the guidelines are implemented consistently throughout the organisation; and

- review its procedures and ensure that all its decisions are recorded accurately, including the reasons for each of the decisions being made.

Professor Alice Brown
Scottish Public Services Ombudsman

25 October 2004

## Annex A

‘29 August 2002

Dear [Company Secretary]

Producer Responsibility Obligations (Packaging Waste) Regulations 1997 (as amended)

I write with regard the above legislation and note from our records that your company has not registered with the Scottish Environment Protection Agency (SEPA) as an obligated producer.

As you may be aware, the regulations require obligated businesses to register with the appropriate agency dependent upon where their registered office or principal place of business is located, whether SEPA (Scotland) or the Environment Agency (England & Wales). Businesses can register individually, as part of a group or associated companies, or through a compliance scheme that is registered with either agency.

In general, businesses have an obligation to register if, during the preceding financial year they fulfilled the function of manufacturer, converter, pack filler, seller or importer in respect of packaging, had a turnover in excess of £2 million and handled 50 tonnes or more of packaging or packaging material.

The regulations interpretation of packaging includes products made of any materials used for containment, protection, handling and delivery as well as the final presentation of goods (it includes, for example, pallets used to transport products). A more comprehensive summary on the requirements of the regulations is enclosed with this letter.

If your business is already registered please accept my apologies for sending this letter. In order to update our records, it would be useful if you could complete the enclosed checklist. A response within 14 days would be appreciated.

Notwithstanding the above, the agency reserves the right to undertake audit checks to establish whether or not businesses fall within the scope of the obligations imposed by the regulations.

Once again please accept my apologies if this letter has been misdirected. If you wish to discuss the matter then please do not hesitate to contact me on [ ].

Yours sincerely

[The EPO]'

## Annex B

'Report to the Licensing Team

Company: [the Company]
Reported by: [The EPO]
Report: 31 October 2002

Producer Responsibility Obligations (Packaging Waste) Regulations 1997 (as amended)

[The Company] are label printers. Labels, depending upon their intended use, are considered to be packaging.

The company has not been registered with SEPA, the EA[2] or a compliance scheme, since the start of the regulations.

A freeloader[3] letter was sent to [the Company] on 29 August 2002. A response was received, following numerous telephone calls, on 21 September 2002, which stated that they handled 500T of paper per annum.

A brief telephone conversation with the Managing Director indicated that the company produces high quality colour labels for use on packaging. However, the managing director is on holiday until 1 November 2002. I have drafted a letter stating SEPA's intention to carry out a formal audit of the company in November 2002.

On the basis of the information provided to date, it is considered highly likely that the company is obligated.

Based on the information provided, it is considered that [the Company] has breached the regulations as follows:

[2] The Environment Agency which has functions in England and Wales similar to those of SEPA in Scotland.
[3] "Freeloader" is a term which is used within SEPA to describe a Company which should have registered under the Regulations but has not done so.

The company failed to register as a producer between 2001 – 2002 and provide data of packaging handled during the calendar years 2000 – 2001 respectively, which constitutes a breach of regulations 3(5)(a), an offence under regulation 34(1)(a).

During the calendar years 2001 – 2002 the company failed to take reasonable steps to recover and recycle a percentage of the packaging waste they handled. This is a breach of regulations 3(5)(b)(i), an offence under regulations 34(1)(b).

On or before 31st January 2001 – 2002 the company failed to furnish the required certificate(s) of compliance. This constitutes a breach of regulations 3(5)(b)(ii), an offence under regulations 34(1)(c).

Recommendation:
Once the results of the formal audit are known, and given that it is most probable that the company have committed a number of offences since the turnover threshold reduced to £2M. I would recommend that a report be submitted to the Procurator Fiscal.'

## Key to names used

| | |
|---|---|
| The Company | a company that prints high quality labels |
| Mr C | the Complainant and Managing Director of the Company |
| The EPO | the Environment Protection Officer |
| Officer A | the Line Manager of the EPO |
| Officer B | the Team Leader of SEPA's Producer Responsibility Unit |
| Officer D | a member of SEPA's Area Licensing Team |

## Abbreviations used

| | |
|---|---|
| SEPA | Scottish Environment Protection Agency |
| The Ombudsman | Scottish Public Services Ombudsman |
| The 2002 Act | Scottish Public Services Ombudsman Act 2002 |
| The Regulations | Producer Responsibility Obligations (Packaging Waste) Regulations 1997 |